

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN VINCENT,

Plaintiff-Appellant,

v

GENESYS REGIONAL MEDICAL CENTER,
DOUGLAS BENTON, D.O., and ALICIA
MORALES, D.O.,

Defendants-Appellees.

UNPUBLISHED

April 6, 2006

No. 259116

Genesee Circuit Court

LC No. 04-078709-NH

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff went to the emergency room at defendant Genesys Regional Medical Center on July 12, 2002 and returned three days later with a ruptured appendix. She later had surgery.

This medical malpractice suit was filed on April 5, 2004. Plaintiff alleged in her complaint the treating physicians at the emergency room were negligent. Plaintiff's complaint identified defendants Benton and Morales as emergency room doctors. However, in their answer, defendants denied Benton practiced emergency medicine and pled "no contest" to the allegation that Morales practiced emergency medicine.

Plaintiff filed an affidavit of merit with her complaint, as required by MCL 600.2912d, from a doctor who was board certified in internal medicine.

Defendants thereafter filed a motion for summary disposition under MCR 2.116(C)(7) and (8), arguing that MCL 600.2912d and MCL 600.2169, regarding the affidavit of merit, had not been satisfied.

After a hearing, the trial court found that plaintiff had not used reasonable diligence in investigating whether Benton and Morales were board certified or had areas of specialty. The

court ruled that the affidavit of merit did not satisfy the statute and, therefore, dismissed plaintiff's complaint under both MCR 2.116(C)(7) and (8).

On appeal, plaintiff argues that the trial court erred in holding that her attorney did not have a reasonable belief that her expert satisfied the statute and that the court erroneously dismissed her lawsuit. She claims that the affidavit of merit from her expert was based on her attorney's previous experience in the Oakland Circuit Court and on counsel's independent research on the status of defendant physicians.

This Court reviews an order granting summary disposition under MCR 2.116(C)(7) and (8) de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. Under that subrule, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The legal sufficiency of the complaint is based on the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under this subrule may only be granted where no factual development could possibly justify recovery. *Maiden, supra*, 119.

In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court accepts as true all the plaintiff's well-pleaded factual allegations, affidavits, and other documentary evidence and construes them in a light most favorable to the plaintiff. *Terrace Land Dev Corp v Seeligson & Jordon*, 250 Mich App 452, 455; 647 NW2d 524 (2002). Whether the claim is barred by the statute of limitations is a question of law subject to review de novo. *Id*; *Bryant v Oakpoint Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

MCL 600.2912d states:

Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

MCL 600.2169 provides:

In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Plaintiff's expert was board certified in internal medicine. Defendant Benton was board certified in family medicine. And while defendant Morales was not board certified, she specialized in emergency medicine. Plaintiff's attorney recounted at the motion hearing the efforts that were taken to determine whether plaintiff's expert was satisfactory. Counsel stated that his law clerk checked the status on the defendants credentials on the "M.D. Board." Because both defendant Benton and Morales were osteopathic physicians, nothing was found. Counsel admitted that nothing had been done to check the "Osteopathic Physician Board." Plaintiff's counsel stated that his office typically calls the hospital to find out what area of specialty defendant doctors might have and whether they are board certified. In this particular case, additionally, because counsel's firm represented some of the physicians at the hospital on other matters, the other physicians were allegedly consulted "to get a little sense for the history of the physicians involved in the case." But counsel relied primarily upon his prior use of the expert in an Oakland Circuit Court case where an urgent care physician was the named defendant and in ten previous cases involving board certified physicians. No affidavit from the law clerk was presented. Apparently plaintiff's counsel never consulted the American Medical Association website, which defense counsel stated listed defendant Benton as board certified in family medicine and defendant Morales' specialty as emergency medicine.

The issue here is the same as that presented in *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004)—whether the plaintiff's attorney had a reasonable belief under MCL 600.2912d that the expert satisfied the expert witness requirements of MCL 600.2169. In analyzing the statute, the *Grossman* Court noted that the initial affidavit of merit need only be based on a reasonable belief because discovery had not taken place and that a plaintiff would only have available "publicly accessible resources to determine the defendant's board certification and specialization." *Id.*, 599. In that case, the plaintiff's counsel accessed the American Medical Association website to determine the defendant's board certification and specialization. That was not done here. While other sources were consulted, none of them had the ultimate information on the board certification and specialty of defendants Benton and Morales.

In light of the fact that defendants' answer contained statements denying that defendant Benton practiced emergency medicine and not contesting that defendant Morales was an emergency room specialist, plaintiff should have known that her own internal medicine expert was not sufficient under the statute. Rather than file another affidavit of merit with an expert that satisfied the statute, plaintiff continued on. After this notice in defendants' answer, plaintiff never checked the AMA website on the qualifications of either defendant Benton or defendant Morales. Rather, she relied on another circuit court ruling involving an urgent care facility rather than an emergency room. Under *Grossman, supra*, we hold that plaintiff did not have a reasonable belief that her expert satisfied the statute.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio